

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 94-20097  
Summary Calendar

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DIANNA JEFFERSON,

Plaintiff-Appellant,

versus

ST. LUKE'S EPISCOPAL HOSPITAL, ET AL.,

Defendants-Appellees.

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Appeal from the United States District Court  
for the Southern District of Texas  
(CA H 91-0008)

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(September 7, 1994)

Before JOLLY, WIENER and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:\*

Plaintiff-Appellant Dianna Jefferson, pro se, appeals the district court's judgment denying her retaliatory discharge claim under Title VII, 42 U.S.C. § 2000e-3(a). The district court adopted what amounted to an advisory jury's finding that

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\*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Jefferson's employer had not retaliated against her for filing a charge with the Equal Employment Opportunity Commission ("EEOC") and entered judgment for the employer. As there was no clear error in that finding, we affirm.

I

FACTS AND PROCEEDINGS

In June 1990, Jefferson took a medical leave of absence from her employment at St. Luke's Episcopal Hospital ("St. Luke's"), during which leave she filed a charge with the EEOC alleging that St. Luke's had discriminated against her on the basis of her race. Shortly thereafter, the department for which Jefferson worked prior to her leave was reorganized, and the position she had occupied (Office Supervisor) was eliminated. When she returned from leave, comparable positions with the hospital were unavailable; so Jefferson took a job with another medical facility. Based on her EEOC charge, Jefferson filed a discrimination suit against St. Luke's and one of her supervisors. Subsequently, Jefferson filed a second charge with the EEOC, this time alleging that the defendants retaliated against her for filing her first EEOC charge by eliminating her position and not offering her a comparable position at the hospital. Jefferson then amended her complaint in the instant suit, adding a retaliatory discharge claim under § 2000e-3(a), and naming a second supervisor as a defendant.<sup>1</sup>

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<sup>1</sup>Jefferson's amended complaint also alleged that (1) she was discriminated against because of her race, (2) St. Luke's policies had a disparate impact on African-Americans as a class, and (3) St. Luke's negligently and intentionally inflicted emotional distress upon her. These claims were dismissed on

In her amended complaint, Jefferson demanded a jury trial. After summary judgment was partially granted, however, Jefferson's sole claim was that of retaliatory discharge under Title VII, and the defendants moved to strike the jury demand, asserting that there was no right to a jury in Title VII actions. Although the district court did not reveal its reasoning, it denied the defendants' motion to strike, and a jury was empaneled to hear the claim. We consider that jury merely advisory in capacity, however, as Jefferson had no right to a jury trial on her retaliatory discharge claim. At the time of trial, there was some doubt whether the Civil Rights Act of 1991,<sup>2</sup> enacted during the pendency of Jefferson's suit, provided a right to a jury trial in Title VII actions that were pending on the effective date of that legislation. Subsequent to the trial, the Supreme Court held that the Act did not retroactively provide a right to a jury trial in pending actions.<sup>3</sup> As such, Jefferson never had a right to a jury trial on her retaliatory discharge claim.<sup>4</sup>

Even when no right to a jury exists, however, a jury may determine the factual issues in a case if the parties consent. As here the defendants, when they moved to strike the jury demand,

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summary judgment and have not been appealed.

<sup>2</sup>Pub. L. No. 102-166, 105 Stat. 1071.

<sup>3</sup>Landgraf v. USI Film Products, \_\_\_ U.S. \_\_\_, 128 L. Ed. 2d 229, 241, 265 (1994).

<sup>4</sup>See Wilson v. UT Health Center, 973 F.2d 1263, 1267 (5th Cir. 1992), cert. denied, 113 S. Ct. 1644 (1993); Young v. City of Houston, Texas, 906 F.2d 177, 181 (5th Cir. 1990).

clearly voiced their opposition to having Jefferson's claim decided by a jury, there was no mutual consent. Again, there was no right to a jury trial; so, absent mutual consent to a jury trial, the jury which heard this case can only be considered advisory in capacity.<sup>5</sup>

At the close of Jefferson's case, the defendants moved for a judgment on partial findings.<sup>6</sup> The district court granted the motion in part, dismissing the claim against the supervisors, as they were not employers subject to suit under Title VII, but denying dismissal as to St. Luke's. At the conclusion of all the evidence, the jury returned a special verdict finding that St. Luke's had not retaliated against Jefferson for filing an EEOC charge. The district court adopted that finding and without elaboration entered final judgment against Jefferson. On appeal, Jefferson disputes only the denial of her retaliatory discharge claim against St. Luke's, contending that the district court's finding of no retaliation was clearly erroneous.

## II

### ANALYSIS

To prevail on a retaliatory discharge claim under § 2000e-3(a), a plaintiff must establish a prima facie case by showing that she engaged in a protected activity, that an adverse employment action followed, and that there was some causal connection between

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<sup>5</sup>See FED. R. CIV. P. 39(c); In re Incident Aboard D/B OCEAN KING, 758 F.2d 1063, 1070-71 (5th Cir. 1985).

<sup>6</sup>See FED. R. CIV. P. 52(c).

the activity and the adverse action.<sup>7</sup> Once a prima facie case is established, the burden shifts to the defendant to articulate a legitimate, non-discriminatory justification for the action. If the defendant is able to articulate such a justification, the burden reverts to the plaintiff who must prove that the defendant's asserted justification is merely pretextual.<sup>8</sup> Ultimately, at trial, though, the plaintiff's burden is to prove that the protected activity was the cause-in-fact of the adverse action. Here, Jefferson was not required to establish that her protected activity was the sole motivating factor; rather, she was required to show that "but for" the protected activity she would not have been subjected to the action which she claims."<sup>9</sup>

The district court's finding whether the protected activity was the "but for" cause of the adverse employment action is subject to the clearly erroneous standard of review.<sup>10</sup> This is not altered in the instant case by the fact that the district court was sitting with what was tantamount to an advisory jury: "review on appeal is from the court's judgment as though no jury had been present. . . . The district court is not bound by the jury's findings, and it is

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<sup>7</sup>Shirley v. Chrysler First, Inc., 970 F.2d 39, 42 (5th Cir. 1992).

<sup>8</sup>McMillan v. Rust College, Inc., 710 F.2d 1112, 1116 (5th Cir. 1983).

<sup>9</sup>Jack v. Texaco Research Ctr., 743 F.2d 1129, 1131 (5th Cir. 1984); accord Johnston v. Harris County Flood Control Dist., 869 F.2d 1565, 1571 (5th Cir. 1989), cert. denied, 493 U.S. 1019 (1990); McDaniel v. Temple Indep. Sch. Dist., 770 F.2d 1340, 1346 (5th Cir. 1985).

<sup>10</sup>See McMillan, 710 F.2d at 1116.

free to adopt them in whole or in part or totally disregard them."<sup>11</sup>

Nevertheless, as the district court was ultimately responsible for its factual findings, it was required to comply with the strictures of Fed. R. Civ. P. 52(a), which provides that the "court shall find the facts specially," one purpose of which is to permit meaningful appellate review.<sup>12</sup> Thus, the district court was required to make findings that would "`provide a sufficiently definite predicate for proper appellate review,'"<sup>13</sup> although "`punctilious detail nor slavish tracing of the claims issue by issue and witness by witness'" was not required.<sup>14</sup>

The only finding of fact in the record is that made by the advisory jury and adopted by the district court: St. Luke's did not retaliate against Jefferson for filing her EEOC charge. Alone, such a conclusional finding would ordinarily be insufficient to permit meaningful appellate review: We would have to speculate as to the factual basis for the ultimate finding of no retaliation,<sup>15</sup>

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<sup>11</sup>In re Incident Aboard D/B OCEAN KING, 758 F.2d 1063, 1071 (5th Cir. 1985) (citations omitted); accord Sullivan v. Rowan Cos., Inc., 952 F.2d 141, 147 (5th Cir. 1992).

<sup>12</sup>See Chandler v. City of Dallas, 958 F.2d 85, 88 (5th Cir. 1992).

<sup>13</sup>Id. at 89 (quoting Westwego Citizens for Better Gov't v. City of Westwego, 872 F.2d 1201, 1203 (5th Cir. 1989)).

<sup>14</sup>Lopez v. Current Director of Tex. Economic Dev. Comm'n, 807 F.2d 430, 434 (5th Cir. 1987)(quoting Ratliff v. Governor's Highway Safety Program, 791 F.2d 394, 401 (5th Cir. 1986)); accord Chandler, 958 F.2d at 89.

<sup>15</sup>"Only if the district court specifies which evidence it adopted and which evidence it rejected in making its finding can we properly and effectively apply the clearly erroneous standard." Lopez, 807 F.2d at 434; accord Ratliff, 791 F.2d at

and a remand for further fact finding would be warranted.<sup>16</sup> No remand is required in this instance, however, as "it is clear from the record and the jury's verdict what the jury must have found and therefore what the district judge, in registering agreement with the verdict, must also have found."<sup>17</sup> A remand for explicit findings would therefore "add nothing to the information that the appellate court already has."<sup>18</sup>

In support of her claim, Jefferson relied on the following evidence: Her position was eliminated shortly after she filed her EEOC charge; at that time, her supervisors knew of her EEOC charge; and following her EEOC charge, she received a lower evaluation than she had prior to filing the EEOC charge. Although a fact finder may have been able to infer a retaliatory motive from these facts, St. Luke's presented evidence of a legitimate, non-pretextual justification for its action: it had contemplated reorganizing

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401 ("In reviewing the district court's finding of no discrimination under the clearly erroneous standard, this Court cannot be left to second guess the factual basis for the district court's conclusion. This Court cannot determine whether the district court's finding that plaintiff failed to demonstrate pretext was clearly erroneous when the district court's finding is not expressed with sufficient particularity." (quoting Redditt v. Mississippi Extended Care Ctrs., Inc., 718 F.2d 1381, 1386 (5th Cir. 1983))).

<sup>16</sup>See In re Incident Aboard D/B OCEAN KING, 758 F.2d 1063, 1072 (5th Cir. 1985) ("Where the court fails to prepare findings of fact and conclusions of law, the proper procedure is to vacate the judgment and remand the case for such findings.").

<sup>17</sup>Collins v. Baptist Memorial Geriatric Center, 937 F.2d 190, 195 (5th Cir. 1991) (quoting McKnight v. General Motors Corp., 908 F.2d 104, 113 (7th Cir. 1990))

<sup>18</sup>Id. (quoting McKnight, 908 F.2d at 113).

Jefferson's department for several months before Jefferson filed her EEOC charge; it created a new supervisory position in the department several months before the EEOC charge, and most of Jefferson's supervisory duties had been assigned to the new position before she went on medical leave; and in Jefferson's absence, St. Luke's found that the department could be operated more efficiently without Jefferson's position, and therefore, replaced her supervisory position with a secretarial position.

In light of the advisory jury's finding, and the district judge's adoption of that finding after hearing all of the evidence, it is apparent that the district court rejected the suggested inference of retaliation to be drawn from the timing of St. Luke's action and accepted St. Luke's explanation that its action was the result of a prior determination to improve the efficiency of Jefferson's department.<sup>19</sup> As such, we cannot say that the district court's finding of no retaliation was clearly erroneous.

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<sup>19</sup>Jefferson also alleged that St. Luke's retaliated against her by failing to offer her a comparable position. It is uncontested, however, that such positions rarely came open, and that none were available at the time that Jefferson's position was eliminated. Furthermore, St. Luke's offered evidence, contradicting Jefferson's testimony, that she was offered the secretarial position in her former department, and that she had been offered other positions in the hospital, all of which Jefferson had declined. Given this evidence, it is likewise apparent that the district court rejected any retaliatory motive in St. Luke's failure to provide Jefferson with a comparable position upon her return to work. We can not say that such a finding was clearly erroneous.



### III

#### CONCLUSION

Having reviewed the record as a whole, we are convinced that the district court's finding of no retaliation, although lacking the desired specificity required by Rule 52(a), is plausible in light of the evidence presented at trial. To remand at this juncture would be to engage in formalism and to waste judicial resources. The judgment of the district court, therefore, is AFFIRMED.